Supreme Court, U.S.
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No. 02-1449

In The
Supreme Court of the United States

IMMACULATE CONCEPTION CORP.,
and DON BOSCO HIGH SCHOOL,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should not this Court deny certiorari where: (1) this Court has already approved the constitutionality of a total ban on offsite commercial billboards, (2) this Court has, in the context of billboard regulation, deferred to legislative judgments concerning esthetics and safety, and (3) petitioners' own testimony establishes a basis for the statute?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
PETITIONERS' ARGUMENT THAT THE STATE IS REQUIRED TO PRODUCE STUDIES, STATISTICS OR EXPERT TESTIMONY REGARDING THE EFFICACY OF THE ADVERTISING PROHIBITION STATUTE, HAS ALREADY BEEN REJECTED BY THIS COURT AND OTHER COURTS. IN ANY EVENT, EVEN IF SUCH A REQUIREMENT EXISTED, SUCH EVIDENCE WAS PRODUCED BY PETITIONERS' OWN WITNESS	2
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Ackerley Communications of Northwest v. Krochalis, 108 F.3d 1095 (9th Cir. 1997) 2, 4

Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) 4

Lavey v. Two Rivers, 171 F.3d 1110 (7th Cir. 1999) 5

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) 2, 3, 4

Outdoor Systems, Inc. v. City of Lenexa, Kansas, 67 F. Supp. 2d 1231 (D. Kan. 1999) 4

United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) 4

SUMMARY OF ARGUMENT

Petitioners' argument that the state of Iowa was somehow required to produce studies or expert testimony justifying the statutory prohibition against advertising signs visible from a primary highway, Iowa Code § 306C.11, and did not do so, misreads the record and is wrong on the law. The prior opinions of this Court, and lower courts, demonstrate that a State does not need to produce studies or expert testimony regarding the efficacy of a billboard prohibition statute; any showing that the State must make can be done with common sense or legal precedent. Moreover, *petitioners' own witness* "helped explain why state law prohibits [the signs]" (App. 3-4): asked whether the signs could be read, this witness answered that it depended on "how fast you were going and if you want to have an accident or not by looking at the signs instead of at the road."

STATEMENT OF THE CASE

Don Bosco High School has baseball and softball diamonds located on school property in the city limits of Gilbertville, Iowa. Thirty-seven "booster signs" of local businesses who have contributed money to sponsor the ball teams are attached to the outfield fences of these ball fields, and are visible from a primary highway. Since these signs run afoul of Iowa Code § 306C.11, a statute which, with exceptions not relevant here, prohibits advertising that is visible from a primary highway, the DOT required their removal. After administrative proceedings resulted in affirmance of the removal order (App. 23, 24-31), petitioners sought judicial review.

The district court found three separate constitutional impediments to Iowa Code § 306C.11, two of which were not ever raised by petitioner. After summary affirmance by the Iowa Court of Appeals, the Iowa Supreme Court reversed the district court, pointing out that that court erred by considering constitutional issues not raised, and erred as well on the First Amendment issues.

REASONS FOR DENYING THE WRIT

PETITIONERS' ARGUMENT THAT THE STATE IS REQUIRED TO PRODUCE STUDIES, STATISTICS OR EXPERT TESTIMONY REGARDING THE EFFICACY OF THE ADVERTISING PROHIBITION STATUTE, HAS ALREADY BEEN REJECTED BY THIS COURT AND OTHER COURTS. IN ANY EVENT, EVEN IF SUCH A REQUIREMENT EXISTED, SUCH EVIDENCE WAS PRODUCED BY PETITIONERS' OWN WITNESS.

This case is controlled by *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), a case which, inexplicably, is neither cited nor discussed in the Petition for Writ of Certiorari. In *Metromedia*, "seven Justices agreed that San Diego's legislative judgment that billboards contribute to traffic hazards and visual blight sufficed to justify a complete ban on off site commercial billboards. *See Metromedia*, 453 U.S. at 510, 101 S.Ct. at 2893-94 (plurality); *id.* at 549-53, 101 S.Ct. at 2913-16 (Stevens, J., dissenting in part); *id.* at 560-61, 101 S.Ct. at 2919-20 (Burger, C.J., dissenting); *id.* at 570, 101 S.Ct. at 2924-25 (Rehnquist, J., dissenting)." *Ackerley Communications of Northwest v. Krochalis*, 108 F.3d 1095, 1099 n. 5 (9th Cir. 1997).

The *Metromedia* opinion makes clear that a state does not need statistics to show that advertising devices may be considered a safety hazard. After noting that other courts have reached this conclusion, this Court stated:

> We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. As we said in a different context: "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

Id. at 509, 101 S.Ct. at 2893 (footnote omitted). A similar conclusion holds with respect to esthetic interests:

> It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as "esthetic harm." San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

Id. at 510, 101 S.Ct. at 2893-94 (footnotes omitted).

Relying on *Metromedia*, lower courts have specifically rejected the argument that the government must make some sort of evidentiary showing regarding the efficacy of a billboard control statute or ordinance. In *Ackerley Communications*, for example, an outdoor advertising business sought to invalidate a regulation limiting the construction and relocation of billboards "because Seattle made no factual showing that the ordinance advances its goals to a material degree." *Id.* at 1097. Rejecting this argument, the court held that: "As a matter of law Seattle's ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interest." *Id.* at 1099-1100. Likewise, in *Outdoor Systems, Inc. v. City of Lenexa, Kansas*, 67 F. Supp. 2d 1231 (D. Kan. 1999), the court reached the same conclusion, specifically pointing out that plaintiff's reliance on *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), the same case relied on by petitioners here, was misplaced. The court pointed out that "in *Edenfield*, however, the Supreme Court did not alter the *Central Hudson* test. . . . Although the government is required to make the above showings, it may do so with common sense and/or legal precedent." *Id.* at 1238-39.

Petitioners' argument seems to be that these particular 37 signs do not pose a threat to traffic safety or esthetics. This Court, however, held in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), that this kind of individualistic "as applied" analysis was erroneous, because "it is readily apparent that this question [whether the regulation directly advances the governmental interest] cannot be

answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to the single person or entity." 509 U.S. at 427. Instead, the "validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." *Id.* at 430. *See also Lavey v. Two Rivers*, 171 F.3d 1110, 1115 n. 18 (7th Cir. 1999).

Even if some sort of particularized evidentiary showing *was* required, that showing has been made in the present case as a result of the "revealing testimony" (App. at 3) of petitioners' own witness, who, asked whether a sign could be read, stated that it depended on "[h]ow fast you were going and if you want to have an accident or not by looking at the signs instead of at the road." App. at 3-4. Thus, even petitioners' own witness recognized the common-sense view that distracting signs can reasonably be viewed as a threat to traffic safety.

CONCLUSION

It would be inappropriate to grant certiorari on an issue that has already been resolved adversely to petitioners by this Court, and by other lower courts. The decision of the Iowa Supreme Court is unquestionably correct and should not be disturbed.

Respectfully submitted,

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